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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

JOHN PEARSON and
STEPHANIE LEE, husband and
wife,

Plaintiffs,

vs.

WRIGHT MEDICAL
TECHNOLOGY, INC., a foreign
corporation,

Defendant.

CV 09-485-PHX-FJM

PLAINTIFFS' RESPONSIVE
MEMORANDUM TO DEFENDANT
WRIGHT MEDICAL TECHNOLOGY,
INC.'S MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
STRIKE

Plaintiffs Pearson, by and through counsel undersigned, hereby submit their response to Defendant Wright Medical's Motion for Summary Judgment and Motion to Strike. The Motion must be denied for the reasons set forth in the attached Memorandum.

DATED this 30th day of April, 2010.

STEPHEN C. RYAN, P.C.

By /s/ Stephen C. Ryan
42104 N. Venture Ct., C-114
Anthem, Arizona 85086
Attorney for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant's motion is predicated on one fact – that Dr. Hendrickson formed his opinions without being aware that the prosthesis in question was a modular prosthesis

1 versus a one-piece prosthesis. The difference in the two types of prosthesis is that the
2 “neck” of the prosthesis which fractured is designed to be removed from the femoral
3 stem in a modular prosthesis whereas the neck and stem are a one-piece configuration
4 in the traditional prosthesis.

5 It is certainly true that Defendant’s counsel scored some points at Dr.
6 Hendrickson’s deposition based upon his misunderstanding in that regard. But
7 Defendant then wants to take that misunderstanding and extrapolate it into a legal
8 victory as a matter of law. As the undisputed facts indicate, however, Dr.
9 Hendrickson’s opinions as to the cause of the fatigue fracture were, and still remain,
10 opinions which are independent of and unrelated to the structural component “style”
11 of the prosthesis. Simply put, Dr. Hendrickson has opined that the prosthesis
12 fractured due to a manufacturing defect and that this defect existed, and caused the
13 fracture to occur, irrespective of whether the prosthesis was of a modular or one-piece
14 design.

15 As Dr. Hendrickson’s current affidavit indicates, and as his prior reports,
16 affidavits and deposition transcript indicate, he bases his opinion on the cause of the
17 fracture on scientific and metallurgical principles separate and apart from the
18 Defendant’s claim of fretting. While it is true that Dr. Hendrickson did not consider
19 the possibility of fretting as a cause of the fatigue fracture because he did not initially
20 believe there was any metal to metal contact near the area of the fracture, his opinions
21 were based upon his macroscopic and microscopic examination of the area of the
22 fracture.

23 As his deposition testimony cited in Plaintiffs’ Supplemental Statement of Facts
24 clearly indicates, he provided defense counsel with at least three separate and distinct
25 reasons why fretting was not and could not be the cause of the failure. More
26 importantly, he did so **before** he learned that the design was modular and that there
27 could have been metal to metal contact near the area of the fracture. In other words,
28

1 Dr. Hendrickson didn't "back pedal" at all – he had already provided Defendant's
2 counsel with multiple reasons why fretting could not have been the cause of the fatigue
3 fracture **before** he knew that his belief as to the component structure of the prosthesis
4 was in error. Simply put, his opinions eliminated any factual support or basis as to
5 Defendant's fretting defense before he even knew that fretting was a possibility.

6 The experts on both sides of this litigation agree that there was a fatigue fracture
7 that occurred. Defendant has hired an expert who claims fretting is the cause of the
8 fatigue fracture. Plaintiff's expert opines that the cause of the fatigue fracture was a
9 manufacturing defect which he described in detail in his report, affidavit and
10 deposition. Present before the Court is nothing but the usual "battle of the experts"
11 which the jury will have to consider and resolve. If Dr. Hendrickson's opinions had
12 solely been based upon, and conditioned upon, the absence of the possibility of fretting
13 at the fracture site, Defendant's motion would arguably have merit. But that's not the
14 state of the record before the Court. A material dispute of fact exists.

15 Defendant next argues that having acquired the ability to make Dr. Hendrickson
16 feel awkward at trial translates into Dr. Hendrickson not being a competent or
17 qualified expert witness. Dr. Hendrickson has rendered scientifically supportable
18 opinions based upon the fracture site as he examined it. The fact that he was mistaken
19 about whether it was a modular or traditional prosthesis has nothing to do with his
20 examination of the fracture site itself nor his opinions. The fracture site, when
21 examined macroscopically as well as microscopically, would have appeared to him
22 exactly the same whether the prosthesis was of a modular or traditional style.

23 For the defendant to suggest Dr. Hendrickson is somehow not even a qualified
24 or competent expert witness is incredulous. As Dr. Hendrickson's Affidavit indicates,
25 he has testified in trials as a metallurgical expert for both Plaintiffs and Defendants for
26 decades. He has testified in dozens of states and federal courts throughout the
27 country. Never once has a judge ruled that he was not qualified to render opinions

1 within his area of expertise. Being mistaken as to the structural style of the failed
2 prosthesis is a disconnect to stating that he is not an expert witness as to metallurgical
3 failures.

4 Defendant argues that Dr. Hendrickson does not have knowledge as to how
5 Wright Medical actually manufactured the prosthesis in question or how the prosthesis
6 left Wright Medical in a defective condition. Defendant then argues that, “Dr.
7 Hendrickson concluded without any evidence that some unknown manufacturing
8 defect must have occurred”. Defendant cites the *Diviero* case where the plaintiff’s
9 expert on tire separation was excluded as an expert witness. However, that expert
10 witness could only testify that the product was defective simply “because it failed”,
11 without offering more.

12 Defendant’s position misstates the record and Dr. Hendrickson’s opinions as to
13 the cause of the fatigue fracture. Dr. Hendrickson has not opined that the prosthesis
14 in question was manufactured defectively just “because it fractured”. In his reports,
15 deposition and affidavits, he has described the basis and nature of how the fracture
16 occurred, why it occurred, and how the defective nature of the prosthesis stem resulted
17 in eventual fracture. Quoting excerpts from his initial report, Dr. Hendrickson stated
18 as follows:

19 “My visual examination indicated to me that the fracture face of the hip
20 prosthesis had all of the macroscopic features characteristic of a fatigue
21 fracture. In that regard, parallel curved lines called ‘beach marks’ are obvious
22 on the fracture surface. A fracture process such as occurred with respect to this
23 prosthesis requires two phases. The first phase is the crack initiation phase.
24 The second phase is the crack propagation phase. Once a crack initiates, the
25 crack tip acts as a stress concentrator and the crack then advances, or
26 propagates, slowly by moving a small distance each stress cycle, depending
upon the magnitude of the applied stress. As the crack propagates, it effectively
cuts through the cross-section of the component, in this case the stem, reducing
the load carrying area, thereby increasing the stress magnitude each cycle of
stress. This causes an increase in the crack propagation rate with increasing
time. When a large enough area is cracked by fatigue such that the cyclical
stress reaches the ultimate tensile strength of the metal, an instantaneous and
final fracture occurs.

27

1 My analysis using scanning electron microscopy, or SEM, revealed the presence
2 of surface cracks at the area identified as the origin of the fracture. Surface
3 cracks such as those I discovered near the fatigue crack initiation site are known
4 to cause fatigue fracture that would otherwise not occur. These cracks act as
5 stress concentrations and crack initiation sites. **The first phase of the
6 fracture process was therefore effectively manufactured into the
7 stem.**

8 In conclusion, my opinion is that the defect of the prosthesis was a
9 manufacturing defect in the form of microcracks on the outer surface of the
10 stem about 34 mm below the proximal end. These microcracks caused the
11 initiation of a fatigue crack which, in turn, propagated through approximately
12 90% or more of the cross section of the stem when exposed to the cyclic stress
13 associated with Mr. Pearson's normal human ambulatory motion. The physical
14 appearance of the macroscopic fracture surface is positive evidence that the
15 fracture of the subject stem was caused by a manufacturing defect, specifically
16 metal fatigue." (Hendrickson Affidavit, paragraphs 7, 11 and 12 – See
17 Defendant's Statement of Facts, Exhibit I, emphasis added.)

18 Defendant conveniently ignores another fact in the record, namely, that
19 Defendant's risk manager has acknowledged Defendant's fault and liability in her
20 conversations with John Pearson. While those discussions between Mr. Pearson and
21 Debbie Dauer, Defendant's risk manager, **later** went on to have settlement overtones,
22 Ms. Dauer admitted liability and fault to Mr. Pearson **before** she invited Mr. Pearson
23 to present a settlement demand to Wright Medical. While those subsequent settlement
24 discussions would be inadmissible pursuant to Rule of Evidence 408, Ms. Dauer's
25 initial acknowledgment of liability and fault is clearly an admission by a party
26 opponent and can be presented to the jury. Although not necessary to defeat the
27 present motion, Defendant's admission of liability by its risk manager precludes
28 summary judgment in Defendant's favor for yet another reason.

DATED this 30th day of April, 2010.

STEPHEN C. RYAN, P.C.

By /s/ Stephen C. Ryan
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Anthem, Arizona 85086
Attorney for Plaintiffs

1 COPY of the foregoing
2 delivered/mailed
3 this 30th day of April, 2010 to:

4 The Honorable Frederick J. Martone,
5 District Court Judge

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7 Donn Christopher Alexander, Esq.
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17 By /s/ Cindy Rock
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